

U> 32

A Simple Justice

- Richard Kluger

History has lifted no chief of state to a more exalted eminence than the angular sixteenth President of the United States. Men have come to venerate him as the incomparable exemplar of selfless leadership, as much spiritual as political in essence. He sits there in Washington still, like God Himself in judgment of us all,

iconography aside, Abraham Lincoln was a man of his time and place and station. He was not a passionate freedom fighter or a believer in the equality of all men of all races. Lincoln's own words belie his latter-day reputation. In his series of seven stump debates with Stephen Douglas for the latter's senatorial seat in 1858, the tall man won much applause for declaring his unequivocal opposition to social and political equality for blacks. He did not approve of their voting. Or holding office. Or serving on juries. Or, to be sure, marrying whites. He favored their ultimate resettlement back in Africa, but so long as they remained in America "... there must be the position of superior and inferior, and I as much as any other man am in favor of having the superior position assigned to the white race." In the White House, he held to his views. He told a delegation of visiting free black leaders that in his judgment most white Americans did not want the black man to remain on their shores. His opposition to slavery and its cruelties was firm, but he came into the presidency emphasizing that he had no wish to end the practice where it prevailed—only to prevent its spread. His entire purpose was to preserve the Union. But the South was unified and militant, the North divided and uncertain. Lincoln was a minority President, a nobody-much from out of the West, and homely as sin. A fratricidal war to keep the long-sparring halves of the country together was beyond the endurance of a badly splintered electorate, the South assumed. Preservation of the Union was simply too abstract a ground to fight upon, and so it would be a swift and successful rebellion, after which the Confederacy and the Union might deal with one another as equals.

But it soon became clear that it would not be a short contest. The South had a mission and better generals. The North had far more people and money. Lincoln's moderate position on the aims of the war gave way as the ghastly killing mounted. Since, at bottom, the black man was the issue, he would have to be freed if a war of this magnitude were to be morally justified. Lincoln proposed a constitutional amendment to accomplish the task. It provided for gradual, voluntary emancipation, culminating no later than the year 1900. The slaveholding states would administer the process themselves, and the federal government would cooperate in reimbursing slaveholders for the loss of their mortal property and in helping colonize the freed slaves. But the country was moving swiftly to a far more radical view of the issue. Lincoln's amendment was not seriously entertained by Congress. He could not hold the anti-slavery forces in check. Men's passions rose with the body count. The war had passed the stage of a police action. The next step would move the sides beyond any hope of reconciliation.

He delayed it as long as he could. He twice overruled field commanders who had issued edicts of abolition in their war zones. He pondered the obviously troubling matter of constitutional authority for the step. The Constitution had left the lawfulness of slavery up to the separate states. The only legal ground Lincoln could plausibly stand on in issuing the Emancipation Proclamation was that of

war-emergency power in his role as commander-in-chief, and so he used it on the first day of the year 1863. Technically, it is true, it did not free anybody within Lincoln's territorial command. It applied only to those slaves in rebel states, excluding parts of Virginia and Louisiana then under Union control. It did not mention the rest of the Union, for there would have been no military justification for such a step. But it did confirm what was happening on the battlefield: it formally invited freed slaves to join the Union army—a step they had taken right along.

Emancipation as a war measure only would not suffice, and for the better part of the next two years Congress debated the wording and implications of a constitutional amendment to free the slaves forever. What rights were to be enjoyed by the freedmen? Were they to become citizens like any other despite their obvious disabilities? Was there perhaps some intermediate stage of citizenship through which the black people ought to evolve? From the language of the Thirteenth Amendment as finally proposed by resolution of Congress on the last day of January 1865, such questions seem not to have been confronted:

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

In fact, the sweep of the amendment had been debated endlessly, and the prevailing view was that by emancipation, every freed black man would stand equal before the law with every white one—except in the matter of voting. Even the most radical of the Republicans and abolitionists, not excluding Horace Greeley and William Lloyd Garrison, were not willing to go that far. By the second section of the amendment, Congress was empowered to take active steps against any state that perpetuated the practice of slavery or the deprivation of rights resulting from it. Opponents of the amendment were left shaken by the very sweep of the measure. It would revolutionize the Constitution, not amend it, they said. It was a wholesale, unwarrantable invasion of the rights of the states and a grievous extension of the power of the central government beyond any bounds ever envisioned for it. The entire federal compact was imperiled by the step. Yet it passed Congress overwhelmingly and was ratified within ten months by twenty-seven states. The niceties of the thus redefined federal compact were dwarfed by the enormity of the conflict just ended. And so the law of the land, seventy-eight years after it was first drawn, now held that the black man was five-fifths of a human being. Beyond that, the language itself did not go, whatever the framers and opponents of the new amendment chose to read into it in the early months of 1865.

Ranged against those few words on paper were two centuries of custom. The black man was clearly going to need help to make his freedom a fact as well as a

right. He could scarcely look for that help from the people who had subjugated him, and so he looked North and to the Yankee troops in his midst.

Soon after passing the Thirteenth Amendment, Congress took the first step. It was a modest one, given the size of the problem presented by the sudden casting adrift of four million black souls with very few pennies to their names. It was a new creature of the War Department, and its manifold functions were reflected in its inelegant name: The Bureau of Refugees, Freedmen, and Abandoned Lands—for short, the Freedmen's Bureau. Upon it was heaped an unimaginable number of chores: provision of food, clothing, and medical care for refugees both white and black; their resettlement on abandoned or confiscated lands where available; overseeing the transition of freedmen to the status of workingmen with full contractual rights in dealing with landlords; and the establishment of schools to achieve at least marginal literacy as rapidly and as widely as possible. The bureau was given one year to function after the war ended and very meager funding. But it was a start, at least—a place for the bewildered freedman to turn. A month after the bill was enacted, Lee surrendered to Grant at Appomattox. Five days later, Abraham Lincoln was dead. The fate of the black man's transition from slavery to liberty now passed into the hands of a man from Tennessee who, it turned out, did not much favor it.

Andrew Johnson, a spiritual and political descendant of Andrew Jackson, hated slavery more for what it had done to the poor-whites of the South than to those in actual bondage. He had favored the war because, frankly, it had "freed more whites than blacks." An avowed foe of the planters, the new President nevertheless soon showed himself to be an easy mark for the fallen masters of the Confederacy. To regain admission to the Union and its seats in Congress, each state of the late Confederacy was obliged only to summon a constitutional convention—to qualify as a participant one had merely to take a non-blood oath of allegiance to the Union or to have been formally pardoned by the President—that would repeal its acts of secession, repudiate the Confederate debt, and abolish slavery in conformity with the Thirteenth Amendment. The planters and other scarcely remorseful Confederates who quickly took command of the new governments saw that this piddling business was disposed of in a fashion that ranged from perfunctory to occasionally outright defiant (South Carolina, for example, refused to repudiate the Confederate debt). By December of 1865, Andrew Johnson reported to Congress that his plan for reconstruction had been accomplished. Congress listened to the President, reviewed reports to it by investigators it had sent South, and concluded that neither the President nor the former Confederate States of America understood what the war had been all about and who had won it.

Aside from abolishing slavery, the South would voluntarily make no provision at all for the African American. His liberation had cost the plantocracy between two and three billion dollars, using the pre-war auction-block price per head as the basis for calculation. That was a great deal of value to lose overnight. The very sight of a former slave was reminder to his former owner that the world had changed drastically. Those proud heads born to command had been made to bend. They did not like the sensation. Whites of all classes viewed any deviation

= pre-civil war era

from the antebellum fashion of subservience as a display of impudence by the black man and did not hesitate to beat him for it. He was, after all, no longer the property of a white man. The journalist Carl Schurz reported back to the Senate:

Wherever I go—the street, the shop, the house, the hotel, or the steamboat—I hear the people talk in such a way as to indicate that they are yet unable to conceive of the Negro as possessing any rights at all. . . . To kill a Negro, they do not deem murder; to debauch a Negro woman, they do not think fornication; to take the property away from a Negro, they do not consider robbery. The people boast that when they get freedmen's affairs in their own hands, to use their own expression, "the niggers will catch hell."

The reason of all this is simple and manifest. The whites esteem the blacks their property by natural right, and however much they admit that the individual relations of masters and slaves have been destroyed . . . they still have an ingrained feeling that the blacks at large belong to the whites at large.

State policy followed private conviction. None of the states reconstructed under the Johnson plan gave the freedman the vote or any other form of participation in the civic life of his state. Nor did any of the state governments make provisions for the education of the freedman. The prevailing view was that a little learning would spoil a black man for hard work, and if he were not available to till the fields, it was not readily apparent who would be.

Beyond such sins of omission, the so-called reconstructed states of the South displayed their active truculence by imposing a series of tightly restrictive laws on the movement and behavior of their former slaves. These Black Codes were designed to fasten the African American to the very misfortune he sought to escape. To seek more attractive work terms, a freedman would of course have had to leave his old plantation in search of a new arrangement, but the moment he did so, he was liable to charges of vagrancy and a fine. The fine might be paid by any landholder, who could then command the alleged vagrant's services—a form, that is, of involuntary servitude proscribed by the newly effective Thirteenth Amendment. In Florida, any black man failing to fulfill his employment contract or who was impudent to the owner of the land he worked was subject to being declared a vagrant and punished accordingly. In Louisiana, the black laborer had to enter into a written contract within the first ten days of the year and, having done so, "shall not be allowed to leave his place of employment until the fulfillment of his contract, unless by consent of his employer . . . and if they do so leave, without cause or permission, they shall forfeit all wages earned to the time of abandonment." Mississippi simply re-enacted its old slave codes *en masse*. And South Carolina, as usual, set the standard of vehemence for the South. No "person of color" was permitted to enter and reside in the state unless he posted a bond within twenty days of arriving, guaranteed by two white property owners, for \$1,000 "conditioned for his good behavior, and for his support." Any black who wished to work in the state at an occupation other than farmer or servant had to be especially

licensed, had to prove his or her fitness for the work, and pay an annual tax ranging from \$10 to \$100. To do farm work, a black in South Carolina had to have a written contract, attested to by white witnesses; failure to obtain one before commencing to work was a misdemeanor punishable by a fine of from \$5 to \$50. Contracting blacks were known as "servants" and the contractors as "masters." Labor was from sunrise to sunset; servants were to be quiet and orderly and to go to bed at a reasonable time. Masters might discharge servants for disobedience, drunkenness, disease, or any of a number of other reasons, none requiring corroboration. A master could command a servant to aid him in defense of his own person, family, or property. The right to sell farm products "without having written evidence from such master, or some person authorized by him, or from the district judge or a magistrate, that he has the right to sell such product" was strictly forbidden.

Such measures, President Johnson told the Senate with a straight face in December of 1865, "confer upon freedmen the privileges which are essential to their comfort, protection, and security." But Congress would not acquiesce in that judgment. The South had been handed an olive branch and, in the fury of defeat, had shaped it into a whip. A less willful people would perhaps have known what the South had failed to appreciate: if it did not rein in its excessive intolerance of the free black man, the North would force it to do so.

After December of 1865, Johnson was a President who presided in name only, Congress formed the powerful Joint Committee of Fifteen to monitor the rest of the reconstruction process. Its dominant voice belonged to the seventy-three-year-old Pennsylvanian Thaddeus Stevens, a founder of the Republican Party, who declared that America did not stand for "white man's government" and to say as much was "political blasphemy, for it violates the fundamental principles of our gospel of liberty. This is man's government; the government of all men alike." Lincoln would have put it more eloquently, no doubt, and would perhaps have proven a man for all seasons, while Stevens was portrayed by his detractors as a crotchety old bachelor bitter over his lifelong condition as a cripple and vindictive toward the South ever since Lee's army had destroyed his ironworks in Caledonia, Pennsylvania. Whether by animus or conviction, Stevens was moved to drive Congress to act.

The Thirteenth Amendment had nationalized the right to freedom. And it made Congress the instrument to enforce that right. Congress began to do so early in 1866 by two acts of legislation—the extension of the Freedmen's Bureau Bill and the first Civil Rights Act. The two acts shared a premise: freedmen were to be protected in their "civil rights and immunities" by the government of the United States and not left to the unmerciful ministrations of the states. In the case of the Freedmen's Bureau Bill, the protection would be carried out by agents of the federal bureau; in the case of the Civil Rights Bill, by the federal courts. Nor were those "rights and immunities" left as generalized pledges. Both of the bills contained a section specifying in identical language the guaranteed rights that, when taken together, were aimed directly at destroying the plainly vicious Black Codes.

Among them were the right to make and enforce contracts; the right to buy, sell, and own real and personal property; the right to sue, be parties in a legal action, and give evidence; and most sweeping and basic of all, the right to "full and equal benefit of all laws and proceedings for the security of person and estate." As a package these rights embodied the basic tenet of abolitionist theory—that liberty was inseparable from equality—and transformed it into law.

In the profound congressional debates over the two bills, their proponents argued that the Thirteenth Amendment plainly mandated that there could no longer be one set of rules governing the conduct of black men and another for whites. Any statute that was not equal to all was an encroachment on the liberty of American society as a whole. Congress was henceforth to be the bulwark against such inequities. Conservatives, reversing their earlier position, now argued that the operation of the amendment had never been thought to be wider than "to cover the relation which existed between the master and his Negro African slave . . . and the breaking up of it." Any wider application of the amendment, the minority argued, exceeded the power it conveyed to the federal government and threatened to alter radically and irreparably the very nature of the federal compact.

But Congress was clearly ready to take revolutionary steps in the federal-state relationship. Both the Freedmen's Bureau and Civil Rights bills were passed, vetoed by President Johnson, and passed again over his veto. Still, the conservatives had made their point. Doubts lingered as to the constitutionality of the radical new laws. Thaddeus Stevens and others guiding the process of what came to be called Radical Reconstruction felt that it was essential to place these newly won rights of the freedman beyond the power of congressional majorities that might shift in the future, fasten a far more restrictive interpretation on the Thirteenth Amendment, and overturn such measures as the Freedmen's Bureau and Civil Rights bills. Another constitutional amendment was therefore required. It would in effect do again what the majority in Congress thought it had done in shaping the Thirteenth Amendment in the first place—give the freed black people of America the same rights as everyone else. This time, though, the language would be far more explicit and sweeping and place the rights guaranteed beyond all constitutional doubt. Certainly the new amendment was revolutionary. Without doubt it was changing the previous division of powers between the state and federal governments. Without doubt it promoted the United States as an interloper between every state and its inhabitants. And without doubt its language asserted that the black man was not only no longer a slave but could not be shunted into some indefinite limbo between slavery and full citizenship. On June 13, 1866, Congress proposed the Fourteenth Amendment to the Constitution. The first section declared:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The fifth and final section of the amendment gave Congress the same power to enforce it "by appropriate legislation" as the federal legislature had received under the second section of the Thirteenth Amendment. Deciding what was "appropriate" would, in short order, provoke heated disagreement. Indeed, the debate has never been settled.

intent to
punish
South

The middle three sections of the new amendment were plainly and intentionally punitive. No former state or federal officeholder who had violated his oath to the Constitution by joining the late Confederate rebellion could now hold state or federal office until Congress lifted the ban by a two-thirds vote at some future date. Furthermore, and excruciatingly painful to many of the South's most ardent defenders, neither the United States nor any state government was to honor any debt incurred "in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void." Holders of Confederate currency and bonds were out of pocket an estimated \$3 billion. And they would never get it back. Added to the reported value of their emancipated slaves and confiscated property, the total financial bloodbath cost the South, according to a later report to the House of Representatives, some \$5.2 billion. For the first fifty years of the nation's history, total federal governmental expenditures had come to little more than \$1 billion. The federal budget would not run as high as \$5 billion in a peacetime year until the New Deal. The unrecoverable losses of the financiers of the Confederacy, then, were of a stupendous proportion and left the region supine before the impending economic takeover by the North.

Though a constitutional amendment does not require the President's approval, Andrew Johnson made his disapproval of the Fourteenth Amendment widely known. The South did not need his advice, of course, to see that the full weight of defeat that it had so far avoided would now come crashing down upon it. As if it had a real option in the matter, ten of the eleven states in the Confederacy refused to ratify the Amendment that they saw as suicidal. Only Tennessee acceded. Three state legislatures rejected the amendment unanimously. The South's defiance now helped hand the Radical Republicans almost total control of the machinery of government in the United States. In the 1866 elections, they won every state legislature, every gubernatorial contest, and more than two-thirds of the seats in both houses of Congress, thereby assuring the party of enough strength to overcome any presidential veto.

The new Congress went right to work. In March of 1867 it passed the First Reconstruction Act. The ten Southern state governments that had failed to ratify the Fourteenth Amendment were ordered disbanded, the states were divided into five military districts, and high civil and military officials of the Confederacy were barred from the state conventions that were to be summoned to pass new constitutions, ratify the Fourteenth Amendment, and—most traumatic of all for the white South—give the black man the right to vote. Only when these steps had been taken would Union bayonets be withdrawn and the South's congressional delegations be seated again in Washington. Three other Reconstruction measures were slammed through in the next twelve months to detail how the process of political

rehabilitation was to be carried out, and to leave little to the imagination of reluctant ex-Confederates.

Nothing about the program infuriated the South more than the obligation to let the freedmen vote. It was a step that had caused sharp debate in the North, where many feared that the African American would be easily manipulated by his former master or readily intimidated into voting against the Republican ticket. Ninety-five percent of the blacks, after all, could not read. The massive Republican election victory in 1866, however, emboldened the shapers of Radical Reconstruction. The fickleness of the public did not have to be impressed upon them. The Republican Party, if it was to retain power, needed the black vote. Thaddeus Stevens saw no sin in admitting as much: "I believe, on my conscience, that on the continued ascendancy of [my] party depends the safety of this great nation. If impartial"—he meant Negro—"suffrage is excluded in the rebel States then every one of them is sure to send a solid rebel"—he meant Democratic—"representation to Congress, and cast a solid rebel electoral vote." A Democratic Congress and President were sure to follow.

Less candidly acknowledged was the stake of Northern business interests in perpetuating Republican economic policies. At war's end, the nation was on the threshold of unparalleled prosperity. It had raw materials, a growing capability to process and manufacture them, and a transportation system flinging its iron tentacles in every direction. By 1868, the railroad had spanned the continent. The Eastern financiers who controlled most of this frenetic activity wanted no barriers in their way—surely nothing like a renewal of the rural-agrarian alliance of Southern and Western interests that had dominated national politics in the decades leading up to the Civil War. Thus, the Congress that was busily dismantling Andrew Johnson's balsawood reconstruction of the South was also using its newly won power to enhance the interests of Eastern money and the rising middle class that was beginning to feed off it. There were tariffs to protect iron and wool manufacturers, among others. The railroads were handed enormous bounties, thousands of square miles of open land on both sides of their trackage, and a variety of other subsidies that, however well rationalized as being in the national interest, were blatant giveaways. Timber and mineral rights on federal lands were sold to private enterprises that paid scandalously little for them. A new national banking and monetary system was established and aimed at providing the maximum benefit to the capital-supplying interests. A sound paper currency was created and secured by government bonds, and a prohibitive federal tax discouraged circulation of notes issued by often irresponsible state banks. To protect and extend such measures, the business bloc piloting the Republican ship was persuaded that black votes were essential.

Unquestionably, some members of the abolitionist wing of the party and others with a primarily humanitarian interest favored black enfranchisement as the morally correct action, as the final step in the conversion of the African American from a bondsman to truly a freedman. That the measure was more of a political and economic device, and a punitive slap at the South, than the culminating ritual in the anointment of the Negro as citizen is testified to by the Republicans' reluc-

...to extend the vote to blacks in the rest of the nation. Not until after the 1868 election returns had been verified did the party introduce the Fifteenth Amendment in February of 1869. Thirteen months later, it had been ratified by twenty-nine states, and to the law of the land were now added the words:

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

Congress was shortly obliged to use its enforcement power as the South exploded in wrath over the humiliating new amendment. The Ku Klux Klan rode out in force and other terrorist groups struck when more than 700,000 former slaves registered as voters and the flower of Confederate manhood was itself banned from the polls by the Fourteenth Amendment. To blunt the reign of terror, Congress passed stiff election-enforcement bills against the Klan and empowered the Army to combat it and oversee the polling process.

Enactment of black suffrage and laws to enforce the right were the high-water mark of Radical Reconstruction. As much as could be done by laws for the slave had now been done, it was widely felt outside the South. A long, sometimes bitter legislative fight under the direction of abolitionist Senator Charles Sumner of Massachusetts, Thaddeus Stevens's comrade-in-arms through the early stages of the Reconstruction drive, was necessary before Congress voted the Civil Rights Act of 1875 under the enforcement provision of the Fourteenth Amendment. It was the last plank in a decade of remarkable legislation that may be said to have marked the true completion of the American Revolution. The new act of 1875 asserted that all people regardless of race or color were guaranteed "the full and equal enjoyment of the accommodations . . . of inns, public conveyances on land or water, theatres and other places of public amusement" and that no one was to be disqualified for jury service because of race, color, or previous condition of servitude. But Sumner had lost his fight to have unsegregated schools included among the rights guaranteed by the bill. Given the rudimentary nature of the public school system in the nation at the time, it did not seem a critical issue. So much else had been won in just ten tumultuous years. The Constitution had been amended three times and dozens of supporting bills had been passed by Congress to provide the black man with freedom, equality, and the vote.

Simple Justice Socratic Seminar

As you read through, *Simple Justice*, take specific notes and reference page numbers, high light quotes, and generate commentary/questions on each of the following points/questions. The day of the Socratic seminar you will be expected to engage thoroughly in a discussion surrounding one of the topics below-you will not know which group you are in until the day of the seminar, so prepare for each. Your grade will be a reflection of your participation/performance in the seminar.

1. Evaluate Lincoln's intentions/motivations for Reconstruction.
2. What was the intent behind the 13th, 14th, and 15th amendments and how was that intent carried through?
3. Compare and contrast the social, political, and economic effects of Reconstruction in the North and South?
4. How do we see federalism in practice during Reconstruction?